Filed 2/4/19 Schine v. Property Solutions International CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

A. KEVIN SCHINE, Plaintiff and Appellant, v. PROPERTY SOLUTIONS INTERNATIONAL, INC., Defendant and Respondent.	B280452 (Los Angeles County Super. Ct. No. SC115304)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

A. Kevin Schine, in pro. per., for Plaintiff and Appellant.

Higgs Fletcher & Mack, John Morris, Derek W. Paradis and Rachel E. Moffitt for Defendant and Respondent.

In 2011, A. Kevin Schine (Schine) filed a lawsuit in Los Angeles, California, in which he alleged that Property Solutions International, Inc. (PSI) fraudulently induced him to enter into a release agreement. The agreement contained a mandatory Utah forum selection clause. Consequently, PSI filed a motion to dismiss or stay on the basis of forum non conveniens. The trial court granted the motion. Schine appealed and we affirmed, holding that Schine's claims arose under the release agreement, and that the Utah forum selection clause therefore applied. On remand, the trial court imposed a stay of proceedings. Rather than refile his lawsuit in Utah, Schine filed a motion to lift the stay and amend his complaint, alleging that the Utah forum selection clause no longer applied because the parties had subsequently entered into a settlement agreement which contained a California forum selection clause. The trial court denied the motion, again holding that Schine's claims under the release agreement had to be filed in Utah, and later dismissed the case. Because the doctrine of law of the case precludes reconsideration of the trial court's ruling, we affirm.

PREVIOUS APPEAL[1]

In 2011, Schine sued PSI, alleging that PSI fraudulently induced him to enter into an agreement containing a mandatory Utah forum selection clause. PSI filed a motion to dismiss or stay

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[1] The following facts were set out in our previous opinion in this case—*Schine v. Property Solutions International, Inc.* (Jan. 27, 2014, B240853) [nonpub. opn.] (*Schine I*).

the complaint based on forum non conveniens. The trial court granted the motion and Schine appealed. We affirmed.

As discussed below, Schine and PSI entered into three agreements during the course of their dealings—an option agreement, a purchase agreement and a release agreement. The Utah forum selection clause was contained in the release agreement, which addressed PSI's lease and subsequent purchase of 46 domain names ending in "vacancy.com" from Schine. (*Schine I*, *supra*, B240853.)

Schine and PSI entered into the first agreement—entitled "Purchase and Option Agreement of *Vacancy.com"—in October 2003 (the Option Agreement). In this agreement, PSI agreed to pay Schine $6,000 for usage rights of the "*Vacancy.com" domain names for three years. Under the agreement, PSI had the option to buy the 46 "*Vacancy.com" domain names owned by Schine for $30,000. The agreement also required PSI to pay an additional $50,000 if any of the domain names generated $10 million in annual sales. The lease was to terminate, and ownership of the domain names was to revert to Schine, if PSI did not exercise the purchase option before the end of the three-year period. The parties eventually declared the first agreement null and void. (*Schine I*, *supra*, B240853.)

Schine and PSI entered into a second agreement—entitled "Purchase Agreement of *Vacancy.com"—in September 2004 (the Purchase Agreement). In this agreement, PSI agreed to pay Schine $7,000 for the transfer of ownership of the domain names from Schine to PSI and the termination of the Option Agreement. PSI also agreed to pay Schine an additional one-time $50,000 payment if the domain "Vacancy.com and/or" the domain names generated $10 million in annual sales. The Purchase Agreement

contained a forum selection clause stating, in part: "It is agreed that the jurisdiction for any action commenced by Schine to enforce the reversion rights under this agreement in the event [PSI] fails to make the payments referenced in Paragraphs 2(a) and/or 2(b) shall be any Superior Court located in the County of Los Angeles, California." The payments referenced in paragraphs 2(a) and 2(b) consisted of two partial payments, totaling $7,000, which constituted the purchase price. (*Schine I*, *supra*, B240853.)

Schine and PSI entered into a third agreement—entitled "Release Agreement between [PSI] and Kevin Schine dated May 25, 2010"—in May 2010 (the Release Agreement). This agreement stated that Schine had a Beverly Hills address and that PSI's primary place of business was in Utah. The Release Agreement acknowledged that Schine had "previously sold, transferred, conveyed and assigned to [PSI], all of [Schine's] right, title and interest in and to" the domain names. In exchange for a "one-time payment, of $3,000," the agreement stated Schine "releases and will forever hold [PSI] harmless from all debt, encumbrances and obligations relating to the Domains. Further, in consideration of the receipt of such payment, [Schine] does hereby forever release and will hold [PSI] harmless from any other obligations related to the Domains . . . including but not limited to any other monetary payment obligations contained in any other agreement between the parties." This $3,000 payment was made "in lieu of any afore agreed upon payments or encumbrances, and fulfills any and all obligations by [PSI] to [Schine] regarding the Domains with respect to any other matter." (*Schine I*, *supra*, B240853.)

The Release Agreement also contained a forum selection clause which stated: "This agreement shall be interpreted under the laws of the State of Utah. Any litigation under this agreement shall be resolved in the trial courts of Utah County, State of Utah. [¶] Should any part of this Agreement be rendered or declared invalid by a court of competent jurisdiction in the State of Utah, such invalidation of such part or portion of this Agreement should not invalidate the remaining portions thereof, and they shall remain in full force and effect." (*Schine I*, *supra*, B240853.)

In December 2011, Schine sued PSI, alleging he had been fraudulently induced by PSI to enter the Release Agreement. Schine's complaint stated causes of action for fraud and deceit, negligent misrepresentation, intentional misrepresentation, concealment, false promise, breach of fiduciary duty, constructive fraud, and breach of the covenant of good faith and fair dealing. The complaint alleged that, under the Release Agreement, PSI paid Schine $3,000 in return for Schine's giving up "his $50,000 contingent participation interest in vacancy.com and the 46 domains that Schine had sold to [PSI]." (*Schine I*, *supra*, B240853.)

The complaint went on to state that a PSI executive had induced Schine to enter into the Release Agreement by telling him that PSI had decided not to enter into the apartment Internet listing service business and intended to sell the "vacancy.com" domain name. The executive falsely offered to "buy out" for $3,000 PSI's $50,000 contingent payment obligation under the terms of the Purchase Agreement "to avoid any disputes with the future domain owner." According to the complaint, the executive's representations to Schine were false

and PSI actually was preparing to use the domain names to enter the apartment Internet listing business. The executive's misrepresentations induced Schine to "sell his interest back to [PSI] at an artificially suppressed price." Had he known the true facts, "Schine would have sold his $50,000 contingent interest for a higher price . . . or Schine would have held onto his contingent interest until the $50,000 contingent payment came due." When Schine learned of PSI's launching of the "vacancy.com" website, Schine sought to rescind the Release Agreement. The complaint sought special damages of no less than $47,000, plus punitive damages on most of the claims. That amount was calculated by deducting the $3,000 paid by PSI from the $50,000 contingent payment obligation. (*Schine I*, *supra*, B240853.)

In January 2012, PSI filed a motion to dismiss or stay on the basis of forum non conveniens. The trial court granted the motion to stay, explaining that Schine's allegations pertained solely to the Release Agreement, that the Release Agreement contained a mandatory Utah forum selection clause, and that the forum selection clause was sufficiently broad to encompass all of Schine's claims. Because Schine could not establish that the Utah forum selection clause was unreasonable, unconscionable, or made in violation of public policy, Schine's case was stayed.

Schine appealed to this court.[2] We affirmed the trial court decision, expressly holding that: (1) Schine's claims arose under

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[2] While this appeal was pending, Schine filed another lawsuit against PSI, this time for injunctive and declaratory relief for alleged violations of Business and Professions Code section 17200 et seq. Schine's second lawsuit involved "the same parties but entirely different causes of action and facts," and resulted in a settlement agreement in November 2013. The

the Release Agreement, and (2) the Release Agreement's forum selection clause applied because it was not ambiguous, unreasonable, unconscionable, or otherwise unenforceable. (*Schine I*, *supra*, B240853.)

In contending that the Los Angeles forum selection clause in the Purchase Agreement applied—rather than the Utah forum selection clause in the Release Agreement—Schine disputed that his claim arose "under" the Release Agreement. However, Schine's complaint was that he was induced by fraud to give up his contingent right to be paid $50,000. "He received that right under the Purchase Agreement. He has no complaint that he was fraudulently induced to enter the Purchase Agreement whereby he obtained the right he now asserts. [¶] Quite to the contrary, he lost his contingent right to the $50,000 as a result of signing the Release Agreement. Basic logic results in the conclusion that his claims arise under the Release Agreement, whereby that right was lost." (*Schine I*, *supra*, B240853, italics omitted.)

Schine's own words, including his proposed damages calculation, only underscored that point. As we explained: "His damage claim is $50,000 minus the $3,000 he received in exchange for giving up the contingent right to the $50,000,

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settlement agreement expressly acknowledged Schine's first lawsuit and then-pending appeal but stated it was unrelated and "not in any way intended to prevent, stop, or limit [Schine's first lawsuit] from proceeding to completion on its merits . . . ." The settlement agreement also contained a California forum selection clause, which provided that "[a]ny litigation arising from, under, or out of this Agreement shall be resolved exclusively in the trial courts of the State of California."

adjusted for other considerations. That right was lost as a result of entering the Release Agreement." Thus, instead of advancing his cause, Schine's argument actually supported our conclusion that the gravamen of the complaint was the alleged fraudulent inducement of Schine to enter into the Release Agreement, based on alleged fraudulent conduct Schine claimed occurred before he executed the Release Agreement. (*Schine I*, *supra*, B240853.)

Schine also contended that, because the complaint did not seek rescission of the Release Agreement, he was not suing under the Release Agreement and, therefore, the Utah forum selection clause did not apply. We found this argument to be unsound. The gravamen of Schine's complaint was that he was fraudulently induced to enter the Release Agreement. In light of that, the forum selection clause in the Release Agreement would have applied whether or not Schine chose to pursue a cause of action for rescission. Schine also took great pains to make it clear that his claim was based on fraud, rather than breach of the Purchase Agreement or any other contract. This eliminated the possibility that Schine was pursuing a breach of contract claim under the Purchase Agreement. (*Schine I*, *supra*, B240853.)

SUBSEQUENT PROCEEDINGS

After we issued our opinion, the trial court dismissed Schine's case with prejudice. Schine then filed a motion for new trial. The trial court granted the motion not on substantive grounds but because our opinion only affirmed the court's stay order and did not discuss potential dismissal of the case. Due process required notice that dismissal was a possible sanction or outcome. After granting Schine's motion, the trial court vacated

its dismissal, imposed a stay of proceedings, and set a "status conference/OSC re: Dismissal for failure to prosecute" for December 2014.

In November 2014, Schine filed a motion to lift the stay and amend his complaint. Schine argued that the Utah forum selection clause no longer applied because the parties had subsequently entered into a settlement agreement which contained a California forum selection clause. According to Schine, "the Utah forum selection clause in the Release Agreement was modified, amended and superseded in favor of an extremely broad, mandatory California forum selection clause . . . that now governs Schine's claims in this action as a matter of law." Schine's motion focused on the trial court's power to lift the stay as well as Schine's alleged right to file a first amended complaint without leave of court. PSI opposed Schine's motion, noting that Schine did not have the right to amend as a matter of course, that the settlement agreement had no bearing on the Utah forum selection clause contained in the Release Agreement, and that PSI would be prejudiced by such a late amendment to the complaint, especially after having established the grounds for a finding of forum non conveniens.

THE TRIAL COURT DECISIONS

The trial court denied Schine's motion to lift the stay and amend his complaint, finding Schine had failed to: (1) present any new facts or evidence that would justify reconsidering or amending the stay order based on forum non conveniens—an order subsequently affirmed by the Court of Appeal; (2) provide any authority that would require the trial court to lift the stay so

that Schine could amend the complaint around the trial court's stay order; (3) establish that fairness and justice obligated the trial court to lift the stay pursuant to Code of Civil Procedure section 473 and permit the amendment; and (4) provide any authority that Code of Civil Procedure section 472 applies after a motion to quash has been filed and granted.

The trial court also found that the settlement agreement was "an entirely different agreement" from the Release Agreement, and thus entirely separate from the allegations raised in Schine's complaint or in his opposition to PSI's motion to stay or dismiss. "[Schine's] complaint is based entirely on the 2010 Release Agreement. The [trial court] has already determined that all claims currently alleged are subject to the 2010 Utah forum selection clause. Given these circumstances, leave to amend the instant complaint [three] years after it was successfully quashed would be unfair, prejudicial[,] and would not be in furtherance of justice. Any new claims based on the Settlement Agreement must be brought as a separate action and not added to the instant complaint, which will ultimately be dismissed if [Schine] does not file an action in Utah." The trial court thus denied Schine's motion and set an "OSC re: Dismissal for Failure to File Action in the Correct Forum" for June 2015.

The OSC was ultimately heard in March of 2016, after which the trial court dismissed Schine's case without prejudice for "having failed to file this action in the correct forum." Schine then filed a motion for new trial, advancing the same arguments he made in his motion to lift the stay and amend his complaint. PSI opposed the motion, arguing that the motion was simply an effort to relitigate the same arguments already made and denied several times by both the trial court and the Court of Appeal.

The trial court agreed with PSI, and denied Schine's motion. In so holding, the trial court noted it gave Schine "a more than reasonable amount of time to file his claims" in Utah but that he had refused to do so. "Schine refused to prosecute in the mandatory forum and had relinquished his right to litigate those claims here. The [trial court's] findings on these issues were affirmed by the Court of Appeal and the subsequent dismissal after the two-year stay was proper based on lack of jurisdiction. [¶] . . . [¶] [Schine] fails to identify any irregularity in the proceedings, accident or surprise, newly discovered material evidence, insufficiency of the evidence[,] or error in the law that would support a new trial. [Schine's] motion for new trial is therefore denied." Schine now appeals from the trial court's dismissal order.

STANDARD OF REVIEW

Forum non conveniens is an equitable doctrine under which a court may decline to exercise its jurisdiction to hear a case when it finds the case may be more appropriately and justly tried elsewhere. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) If a court grants a stay on grounds of forum non conveniens, it retains jurisdiction over the case and may resume the proceedings if the action in the alternative forum is unreasonably delayed or fails to reach a resolution on the merits. (*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 857.) A dismissal, on the other hand, completely deprives the court of jurisdiction over the case. (*Id.* at pp. 857-858.)

"The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its

determination in this regard." (*Stangvik v. Shiley Inc.*, *supra*, 54 Cal.3d at p. 751.) Consequently, we review the trial court's decision using the abuse of discretion standard.[3] (See *America Online, Inc. v. Superior Court*, *supra*, 90 Cal.App.4th at p. 9; see also *Piper Aircraft Co. v. Reyno (*1981) 454 U.S. 235, 257 [102 S.Ct. 252, 70 L.Ed.2d 419] ["The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion" (italics omitted)].) We will only interfere with a trial court's exercise of discretion if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could have reasonably reached the challenged result. (*Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 696.) As long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be set aside. (*Ibid*.)

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[3] Although the Third District Court of Appeal has held that the substantial evidence standard of review applies where a forum is selected by contract (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680), other courts have expressly disagreed with this conclusion and continue to employ the abuse of discretion standard. (See, e.g., *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 9.) While we also adhere to the abuse of discretion standard, neither our conclusions, nor the result in this case, would change even were we to apply the less deferential substantial evidence standard.

DISCUSSION

I. The Law of the Case Doctrine

The parameters of the law of the case doctrine have been established for decades. "Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court's decision must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal." (*People v. Jurado* (2006) 38 Cal.4th 72, 94.) The doctrine applies, in civil and criminal cases, to decisions of intermediate appellate courts and courts of last resort. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211.) The policy underlying the doctrine is judicial economy. "Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding. [Citations.]" (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 435.)

In sum, the doctrine is a procedural rule that precludes reconsideration of a previously decided issue in the same case. In *People v. Boyer* (2006) 38 Cal.4th 412, the California Supreme Court summarized the doctrine as follows: " '[W]here an appellate court states a rule of law necessary to its decision, such rule " 'must be adhered to' " in any " 'subsequent appeal' " in the same case, even where the former decision appears to be " 'erroneous[.]' " ' [Citations.] Thus, the law-of-the-case doctrine 'prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances.' [Citation.] The doctrine is one of procedure, not jurisdiction, and it will not be applied 'where its

application will result in an unjust decision, e.g., where there has been a "manifest misapplication of existing principles resulting in substantial injustice" [citation] . . . .' [Citation.]" (*Id.* at p. 441.) "Moreover, '[a] decision on a matter properly presented on a prior appeal becomes the law of the case even though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed. [Citations.]' [Citation.] Thus, application of the law-of-the-case doctrine is appropriate where an issue presented and decided in the prior appeal, even if not essential to the appellate disposition, 'was proper as a guide to the court below on a new trial.' [Citation.]" (*Id.* at p. 442.)

"Because the rule is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' [citation], or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]. The unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination. [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 787.) As explained above, the law of the case doctrine promotes finality by preventing relitigation of issues previously decided. (*Searle v. Allstate Life Ins. Co.*, *supra*, 38 Cal.3d at p. 435.) "Absent an applicable exception, the doctrine 'requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong.' [Citation.]" (*People v. Barragan* (2004) 32 Cal.4th 236, 246.)

II. Application of the Doctrine Here

In January 2014, we affirmed the trial court order granting PSI's motion to stay on the basis of forum non conveniens. In so holding, we expressly decided that: (1) Schine's claims arose under the Release Agreement and (2) the Release Agreement's forum selection clause applied because it was not ambiguous, unreasonable, unconscionable, or otherwise unenforceable. Consequently, we held, the trial court did not abuse its discretion in granting PSI's motion to stay and directing Schine to refile his lawsuit in Utah. Schine's November 2014 motion requested that the trial court reconsider whether, in light of the subsequent settlement agreement, Schine's claims against PSI still arose under the Release Agreement and whether the Release Agreement's forum selection clause still applied. However, our previous opinion conclusively resolved both issues, which means our holdings must be adhered to by both the lower court and upon subsequent appeal.

Nevertheless, according to Schine, the settlement agreement, entered into while the previous appeal was still pending, compels a different result. We disagree. We first note that the settlement agreement expressly acknowledged Schine's then-pending appeal and stated that the two matters were unrelated. Moreover, according to the settlement agreement, it was "not in any way intended to prevent, stop or limit [Schine's first lawsuit] from proceeding to completion on its merits." Thus, by its own terms, the settlement agreement did not modify, amend or supersede the Release Agreement in any way. Indeed, had the California forum selection clause in the settlement agreement actually supplanted the Utah forum selection clause in the Release Agreement, common sense dictates that Schine

would have withdrawn his then-pending appeal, given that he would have received the very concession he was seeking on appeal at the time. Instead, Schine agreed that his first lawsuit and appeal would proceed as planned, thus impliedly admitting that the settlement agreement did not, in fact, alter or supersede the Release Agreement's forum selection clause and did not resolve the issue then on appeal.

In seeking to avoid of the law of the case bar, Schine does not contend that the controlling rules of law have been altered or clarified by an intervening decision. Instead, he appears to rely on the unjust decision exception, arguing that the doctrine "does not apply when, on remand, the facts, evidence, circumstances and issues have substantially changed." However, as the foregoing authorities establish, before a defendant can avail himself of the unjust decision exception, he must demonstrate not just that the decision in question was erroneous, but that it constituted a manifest misapplication of existing legal principles. (*People v. Stanley*, *supra*, 10 Cal.4th at pp. 786-787.) Schine has not done so here, and where, as in this case, an appellate court makes a ruling as a matter of law on an issue necessary to the outcome of the case, that ruling becomes determinative of the rights of the parties on remand and in subsequent appeals. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 301.)

Just as the trial court was bound by the determinations of law in our prior opinion, and thus did not err in relying on those determinations on remand (see *People v. Shuey* (1975) 13 Cal.3d 835, 842, 846), we are similarly bound by our prior opinion. Indeed, Schine's argument on appeal amounts to nothing more than an untimely request to rehear or reconsider a decision that

was rendered four years ago. Reconsideration at this point, however, would run afoul of the principles of finality and judicial economy upon which the law of the case doctrine is based. Both parties raised, argued, and supplied evidence regarding the applicable forum selection clause when before the trial court and on appeal. No injustice results from enforcing the consequences of the first appeal, which decided issues squarely presented and fully litigated by the parties. To the contrary, an injustice would result from not applying the law of the case doctrine here, for no change of facts, law, or circumstances has been presented to justify a departure from our prior ruling. The settlement agreement—specifically drafted to bypass the forum selection issue then pending on appeal—cannot constitute a change of facts or circumstances.[4]

We also decline to impose sanctions for filing a frivolous appeal as requested by PSI. Given the strict standard for imposing sanctions and Schine's in propria persona status, we decline to impose sanctions here. While courts have imposed sanctions on appellants who prosecuted appeals in propria persona, those appellants were either attorneys, had legal backgrounds, or prosecuted the appeal for an obvious improper purpose. (Cf. *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1558-1559; *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 310-313; *In re Marriage of Stich* (1985) 169 Cal.App.3d 64, 75-78.) There is no indication in the record that Schine has any

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[4] Given that the law of the case doctrine bars further consideration of Schine's appeal, we need not reach PSI's additional argument that, if the doctrine does not apply, the trial court acted within its discretion in denying Schine's motion to lift the stay and amend the complaint.

legal background or that he does not in good faith believe the merits of his case. "We do not believe it is appropriate to hold a propria persona appellant to the standard of what a 'reasonable attorney' should know is frivolous unless and until that appellant becomes a persistent litigant." (*Kabbe v. Miller* (1990) 226 Cal.App.3d 93, 98.)

DISPOSITION

The order is affirmed. Although we decline to impose sanctions against Schine for filing a frivolous appeal, PSI is awarded its costs on appeal from Schine.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.